SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 53

WILLIAM EARL FIKES,

Petitioner,

v.

STATE OF ALABAMA,

Respondent

PETITIONER'S REPLY BRIEF

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In this brief petitioner will reply to some of the statements and arguments in the Brief of Respondent in the order in which they appear.

Respondent's Statement

Respondent asserts that "[I]t was not customary to enter a charge on the recorder's docket unless the suspect should demand a preliminary hearing." (Resp. Br. p. 9). But the Chief of Police testified in response to the following question: "Do you recall stating that in every case where a warrant was made, the information on the warrant was transferred to the recorder's docket, sir?" Answer "Yes, that is right."[1] (R. 221).

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[1] There was later some qualification of this admission by the witness which in no way affects this case. He testified to the effect that unnumbered warrants—those served on out-of-town prisoners—were not placed on the recorder's docket (R. 222) but petitioner was not an out-of-town prisoner.

Despite confusion on some collateral aspects of the service of warrants and the placing of cases on the recorder's docket, two things remain clear: (1) Petitioner was taken to Kilby on Monday; the recorder held hearings on Tuesday (R. 197). The decision as to whether a prisoner goes before the recorder or not is made by the Chief or Captain of Police (R. 221). By their decision petitioner was not brought before a recorder or magistrate as required by Alabama law, especially in the exceptional case of civilian arrest,[2] and (2) prisoners taken within the city were customarily served a warrant (R. 222) which was entered upon the recorder's docket (R. 222)—which did not occur in this case.

Respondent asserts that "it was not established whether this attorney [who had been denied the right to see petitioner] had attempted his visit before or after the confessions." (Resp. Br. p. 11).

The Warden of Kilby Prison testified concerning the date on which counsel was barred: "It was one Saturday, but I don't remember the date." Question: "Was that before that alleged confession?" Answer: "Yes, I believe it was. I couldn't say that for sure." (R. 324). Petitioner submits that the substantially positive testimony of the state's witness, the warden, testifying on a matter concerning which the State was attempting to sustain its burden cannot be construed to mean that counsel was excluded at some later date.

Concerning the motion to quash the venire, respondent asserts that a number of impersonal sources were employed (i. e. phone book, city directory, etc.) (Resp. Br. p. 12), but neglects to say that these impersonal sources were used only when the persons listed thereon were known to a commissioner (R. 74-75) or known to persons whom the

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[2] Title 15, Code of Alabama, Section 160.

commissioner asked to furnish names (R. 76-77). Therefore, the system was essentially that of selection from among persons known to the commissioners or known to their acquaintances.

Respondent's Argument

In the argument it is stated that petitioner was transferred to Kilby "as a protective measure" (Resp. Br. p. 14).

But state's witnesses admitted that there was nothing against which petitioner needed protection (R. 207-208). Indeed, other prisoners in the Selma jail, held for the same offense, and concerning whom the public could have felt no differently, were not moved for "protection." (R. 207). Although there is no evidence that petitioner was taken before the recorder or any other magistrate, respondent states that "[i]t is questionable whether or not he was brought before a magistrate, although testimony shows that he was imprisoned on an order of the Circuit Judge of Dallas County, Alabama, (Resp. Br. p. 14). This was apparently an order to transfer a prisoner from a jail to the penitentiary and does not purport to have provided the safeguards of a preliminary hearing.[3]

Respondent argues that petitioner was permitted to see a sheriff and his employer shortly after his arrest (Resp. Br. p. 14). Of course these people had no legal obligation to secure counsel or otherwise aid petitioner, but even if their visit could be deemed to have legal significance, petitioner was effectively insulated from such contacts immediately thereafter, when on Monday morning, he was taken to Kilby where virtually all the interrogation, and the solitary confinement occurred.

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[3] The Captain of Police testified that it was "an order or request or something of the Circuit Judge, Judge Callan." (R. 201).

Effort is made also to confer legal significance on the fact that after one "confession" petitioner was visited by his father. The record reveals that petitioner's father came to see him on Thursday (R. 305) prior to the first confession but was unable to see him until Sunday (R. 305) after it had been exacted. The father, who was so incapable or unaware that he never spoke to or authorized a lawyer in his son's capital case (R. 305) is hardly a man to whom the state can shunt its duty to afford adequate procedural protection.

There was also an effort to confer legal significance on the fact that he was "advised of his rights" by his interrogators. Petitioner submits that in this capital case, even if this defendant had been advised of his rights in open court and had expressly waived the right to counsel, in view of petitioner's ignorance,[4] and mental condition[5] this Court would hold such waiver to be without legal significance. In *Rice* v. *Olson*, 324 U.S. 786, 788-789, it was held "it is enough that a defendant charged with an offense of this character [burglary] is incapable adequately of making his defense, that he is unable to get counsel, and that he does not *intelligently and understandingly waive counsel*"[6] (emphasis supplied).

Respondent cites several cases, arguing that they sustain the judgment below. But in *Gallegos* v. *Nebraska*, 342 U.S. 55, the Nebraska confession was given almost instantaneously upon being taken into custody by Nebraska (at p. 58). The Texas confession there which some members of this Court thought Nebraska should not have to defend (at p. 68), was rendered after four days confinement (at p. 57). The Texas questioning was no more than an hour

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[4] Third grade education completed at age 16 (R. 307, 308).

[5] Uncontradicted testimony by three experienced psychiatrists that he was schizophrenic (R. 285, 290, 295).

[6] See also *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441.

or two on but perhaps two of these days (at pp. 57-58). In *Stein* v. *New York*, 346 U.S. 156, the twelve hours of questioning spanned 32 hours (at p. 185). In *Stroble* v. *California*, 343 U.S. 181, one confession was given *instanter* (at pp. 185-186), the other after two hours (at p. 187). In *Brown* v. *Allen*, 344 U.S. 443, there was no evidence of prolonged questioning (at p. 476).

But mere calculation of days and hours is not all that distinguishes the cases cited by respondent. In *Lisenba* v. *California*, 314 U.S. 219, defendant was a man of business experience. He was represented by counsel at arraignment in court and thereafter. In *Stein* defendants were tough criminals whom a majority of this Court deemed competent to defend their own rights. In *Gallegos* the illegal detention took place a ter not prior to the Nebraska confessions.

Here we have an ignorant, mentally ill Negro defendant probably as incapable of defending his own rights as a prisoner can ever be. On a capital charge, he was taken a distance of fifty miles to the state penitentiary by the police who were under "unusual pressure" to solve a number of burglaries and rapes including a case of burglary and attempted rape involving the Mayor's daughter. There he was questioned, the state admits, at least 27 hours over a period of ten days. When not under interrogation he was kept in solitary. He was not arraigned nor advised of his rights by a nonpartisan judicial officer authorized to appoint counsel. The complex of facts indicates a compulsion present in none of the cases cited by respondent.

Respondents oppose petitioner's assertion that to require him to testify fully on the *voire dire* as to admissibility of the confession denied his constitutional rights. But respondents fail to make the fundamental distinctions between petitioner's *testimony in his own defense*, during his own case, and his testimony on a point of law bearing only

on the admissibility of the confession. In *Witt* v. *United States*, 196 F. 2d 285 (9th Cir., 1952), the issue was whether defendant could take the stand for a limited purpose *in his defense*.

If petitioner could be required to testify generally on this issue of admissibility, the state could achieve indirectly what it is forbidden to achieve directly. Even if his testimony on the *voire dire* would exclude the confession the state could nonetheless obtain thereby other information to aid in conviction. In *Stein* v. *New York*, 346 U.S. 156, 203, Justice Frankfurter dissenting, in discussing an interpretation of the majority opinion, wrote:

> . . . But if law officers learn that from now on they can coerce confessions without risk, since trial judges may admit such confessions provided only that, perhaps through the very process of extorting them, other evidence has been procured on which a conviction can be sustained, police in the future even more so than in the past will take the easy but ugly path of the third degree. I do not remotely suggest that any such result is contemplated by the Court. But it will not be the first time that results neither desired nor foreseen by an opinion have followed.

Identical results would follow from holding that the trial court was correct in upholding respondent's intention to question petitioner—during petitioner's testimony on the preliminary hearing—as to every matter in evidence.[7]

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[7] Some of the clearest evidence of the involuntariness of the confessions appears upon the face of one of them. The tape recorded confession (R. 232-237) consists almost entirely of "Yes" and "No" answers to leading questions, and at crucial points the leading took the form of putting highly incriminating words in defendant's mouth. It will be recalled that prosecutrix testified that the burglar entered her home through a bedroom window (R. 187). Concerning the point of the burglar's entry, the

State v. *Whitener*, 191 N.C. 659, 130 S.E. 603 (1926), a case not cited in petitioner's original brief presented a similar situation. In that case the Supreme Court of North Carolina held:

> The record, therefore, presents the question squarely as to whether the prisoner, at his own request, was entitled, as a matter of law, to testify before the judge in the absence of the jury, on the preliminary inquiry addressed only to the court, with respect to the admissibility of the alleged confession as evidence against him. We think the prisoner, at his own request, was entitled to be heard on this preliminary inquiry—the credibility of his testimony, of course, being a matter for the judge. (at p. 661)

In this case the jury was present during the *voir dire* but even if it had been excluded that would not have prevented the state from obtaining evidence in its cross-examination of petitioner which it might have introduced later during the case to help secure his conviction.[8] Such evidence as it might obtain from this general cross-examination would be the only evidence upon which it could secure petitioner's conviction, for apart from the conviction there was no evi-

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transcript of the tape recording of petitioner's alleged confession is as follows:

"Now, how did you get in that house, William? Er—I went around to the side window and took a piece of wire and opened the screen and come through that.

"And what kind of room were you in then? I was in a—er—

"What kind of room was it, William, do you remember? I was in a ki——

"In a bedroom with a child? Bedroom?

"Who was in that bedroom William? Baby."

[8] Moreover, even though the jury had been excluded, if petitioner had been compelled to testify against himself one could not be realistically certain that incriminating testimony would not be brought to the jury's attention.

dence whatsoever of petitioner's guilt. Indeed, if Alabama were to hold that the confession were coerced, it could then assert under *Stein* v. *New York, supra,* that there should be no reversal of the conviction because other evidence in the record tended to establish a finding of guilty. And this evidence could be the evidence which the state obtained through petitioner when he took the stand to testify that the confession was involuntary.

Respectfully submitted,

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